SEP 3 1974

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1973

No. 74-230

ROBERT V. RAFTER,

Petitioner,

v.

THE FAIRFIELD COUNTY TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	3
Argument	4
Conclusion	5

CITATIONS.

Cases:

Dale v. Hahn, 440 F.2d 633 5
Nix v. Fulton Lodge Workers, 452 F. 2d 794, cert. den. 92 S.Ct. 2044 5
Richmond Education Ass'n v. Crockford, 55 FRD 362 3, 5
Tucker v. Maher, 497 F. 2d 1309 ..... 1, 4, 5

The Constitution:

The Fifth Amendment 2, 5
The Seventh Amendment 2, 5

Statutes:

Title 28 U.S.C. 1343 ..... 2, 3
Title 28 U.S.C. 1254(1) 2
Title 42 U.S.C. 1983 and 1985 ..... 2, 3

Miscellaneous:

Federal Rules of Civil Procedure, Rule 12(b) 2, 3, 5
27 Federal Rules Decisions 124 4

II.

INDEX TO THE APPENDIX.

	PAGE
Judgment of U.S. Court of Appeals Affirming Rule 12(b) Dismissal of Complaint	A1
Complaint	A3
Jury Demand	A6
Defendant's Motion to Dismiss for Insufficiency	A7
Defendant's Notice of Motion to Dismiss	A8
Defendant's Memorandum in Support of Motion to Dismiss	A9
Opinion of the U.S. District Court for the District of Connecticut (Jon O. Newman, U.S.D.J.)	A12
Judgment of Dismissal of U.S. District Court	A14
Constitutional and Statutory Provisions	A15
Rule 12(b), Federal Rules of Civil Procedure	A19

IN THE

Supreme Court of the United States

October Term, 1973

No. .....

ROBERT V. RAFTER,

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THE FAIRFIELD COUNTY TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case 3 June 1974 (A1), affirming the district court dismissal of the complaint for insufficiency (A7).

Opinions Below

There was no opinion rendered by the U.S. Court of Appeals, but its judgment recites that it is based upon "the opinion of Judge Newman, dated October 24, 1973 (A2), and upon the authority of *Tucker v. Maher*,[1] slip op. 3275 (2d Cir. May 7, 1974), and cases cited therein" (A1).

[1] West Publishing Co. advises that this case will bear citation 497 F. 2d 1309 in the 19 August 1974 advance sheets.

The opinion of the U.S. District Court for the District of Connecticut (JON O. NEWMAN, U.S.D.J.) dated 24 October 1973 is set forth at page A12 of the appendix and is not officially reported

Jurisdiction

The judgment of the U.S. Court of Appeals was entered 3 June 1974 (A1). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented

The issue here is whether the court of appeals can condone the district court findings of fact on a Rule 12(b) (6) motion for dismissal of the complaint for insufficiency.

The subsidiary issue is whether the district court findings that the complaint is directed at *good faith acts* (although the complaint alleges bad faith acts pursuant to conspiracy to deprive and obstruct) and acts in the past (although the complaint alleges *present* acts and continuing) are in violation of due process, given the wording of Rule 12(b) (6) and mindful of petitioner's demand for trial by jury.

Statutes Involved

The constitutional and statutory provisions which are relevant to decision of this case, and the pertinent text of which is appended hereto, are the Fifth and Seventh Amendments to the Constitution of the United States, Rule 12(b) (6) of the Federal Rules of Civil Procedure, 28 U.S.C. 1343 and 42 U.S.C. 1983 and 1985.

Statement

The complaint, filed 9 August 1973, alleges jurisdiction in the district court under Title 28 USC 1343 and alleges acts pursuant to a conspiracy to deprive and obstruct in violation of Title 28 USC 1983 and 1985 (A3).

Defendant moved to dismiss for failure to state a cause of action pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure (A3).

The district court (JON O. NEWMAN, USDJ) dismissed the complaint, finding that the complaint embraced *good faith acts* only, and finding further that the complaint was directed at *past acts* only (A12, A13).

The court of appeals affirmed (A1).

Reasons for Granting the Writ

The court of appeals has sanctioned the lower court's departure from the accepted and usual course of judicial proceedings.

Briefly, the plaintiff's version of the facts should be assumed to be true on a Rule 12(b) (6) motion.[2]

The complaint alone was before the court; there were no depositions, admissions or affidavits submitted. This was not a case of the motion to dismiss being converted into a motion for summary judgment.

The district court has exceeded its powers in deciding factual issues, and the court of appeals has approved. Due process and the right to trial by jury are now at issue.

---

[2] *Richmond Educational Ass'n v. Crockford*, 55FRD 362.

Argument

A conspiracy has been defined as a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus, a conspiracy is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member[3].

The complaint alleges a conspiracy to deprive and a conspiracy to obstruct[4] and violation of rights under the fourth, fifth and fourteenth amendments[5].

Moreover the, lower court decision refers to *prior* good faith use[6]; the complaint alleges present use to the date of the complaint and continuing[7].

It would appear that the lower court decision is concerned only with prior good faith acts (as are the two cases cited in its opinion): and it would further appear that *Tucker v. Maher* is also devoted to good faith acts[8], and at page 3 of the slip opinion:

> Relying on *Kavenewsky v. Greater Dev. Co.* . . . the court held that 'there is no basis for the assertion of a damage claim against those who, acting in good faith, secured an attachment under the then existing statutes.' Kavenewsky, in turn, depended upon an opin- of Judge Newman, *Pfotzer v. Dorr-Oliver, Inc.* . . .

---

[3] 27 FRD 124.

[4] Complaint paragraphs FIFTH, SEVENTH, EIGHTH and NINTH (A4, A5).

[5] Complaint paragraph SIXTH (A4).

[6] Decision (A13).

[7] Complaint, paragraph SEVENTH (f) (A4).

[8] *Tucker v. Maher*, 197 F. 2d 1309, at page 6. of slip opinion: "there is nothing in the record to suggest that he was acting in bad faith."

> which held that in the absence of any showing that persons have acted in bad faith . . . they will not be required to respond in damages.

The court of appeals judgment relies on the lower court opinion and on *Tucker v. Maher*, and upon the cases cited therein, and this would seem to be error.

Were the complaint to be reinstated, defendant could put petitioner to his proof by interrogatory, deposition and motion for summary judgment. Then the district court could determine whether proof of bad faith was forthcoming.

Petitioner seeks his right to due process including the right to have the facts determined by a jury[9].

The district court has decided that the acts alleged are acts of good faith and that they are past acts as distinguished from present an continuing acts. These findings run counter to Rule 12(b) (6)[10] and violate the FIFTH and SEVENTH amendments. The court of appeals approves.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT V. RAFTER,
Counsel for Petitioner.

---

[9] Jury demand filed by petitioner with complaint (A6).

[10] *Richmond Education Ass'n v. Crockford*, 55 FRD 362; *Nix v. Fulton Lodge Workers*, 452 F.2d 791, cert. den. 92 S.Ct. 2044, at 797; *Dale v. Hahn*, 440 F.2d 633 (CA 2d 1971) at 638.

APPENDIX

Judgment of U. S. Court of Appeals Affirming Rule 12(b) Dismissal of Complaint

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of June one thousand nine hundred and seventy-four.

Present:

HONORABLE LEONARD P. MOORE,
HONORABLE HENRY J. FRIENDLY,
HONORABLE WILFRED FEINBERG, *Circuit Judges.*

ROBERT V. RAFTER,

Appellant,

against

THE FAIRFIELD COUNTY TRUST COMPANY,

Appellee.

74-1209.

Appeal from the United States District Court for the District of Connecticut.

Judgment of U. S. Court of Appeals Affirming Rule 12(b) Dismissal of Complaint

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Newman, dated October 24, 1973, and upon the authority of *Tucker v. Maher,* slip op. 3275 (2d Cir. May 7, 1974), and cases cited therein.

LEONARD P. MOORE,
HENRY J. FRIENDLY,
WILFRED FEINBERG.

A3

Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ROBERT V. RAFTER,

Plaintiff,

against

THE FAIRFIELD COUNTY TRUST COMPANY,

Defendant.

Docket No. .....

ROBERT V. RAFTER, the plaintiff above named, appearing *pro se*, for his complaint herein alleges:

FIRST: This action arises pursuant to the provisions of Title 42, U.S.C., Sections 1983 and 1985.

SECOND: Jurisdiction is invoked under the provisions of Title 28, U.S.C., Section 1343.

THIRD: At all times hereinafter mentioned plaintiff was a citizen of the United States, domiciled in Weston, Connecticut.

FOURTH: At all times hereinafter mentioned THE FAIRFIELD COUNTY TRUST COMPANY, defendant above named, was a domestic corporation organized under the laws of the State of Connecticut, having offices at the Fairfield County Trust Building, 637 West Avenue, Norwalk, Connecticut.

FIFTH: The defendant in combination with certain Commissioners of the Superior Court (Koizim & Davidoff, Vincent Tirola, Daniel Meister and Leo Kivell) and certain Deputy Sheriffs for the County of Fairfield (Floyd Blackmon, Samuel H. Cioffe, and George Ferrera) and others acting in concert or through joint action conspired for the purpose of impeding, hindering, obstructing, or defeating the due course of justice in the State of Connecticut, with the intent to deny plaintiff the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, his right to the equal protection of the laws.

SIXTH: Defendant and others acting jointly under color of the statutes of the State of Connecticut subjected the plaintiff, or caused the plaintiff to be subjected, to the deprivation of rights, privileges, and immunities secured by the Constitution of the United States including but not limited to those rights, privileges, and immunities secured by the Fourth, Fifth and Fourteenth Amendments of the Constitution.

SEVENTH: Defendant and others acting jointly and in concert pursuant to the conspiracy aforesaid and in furtherance of said conspiracy performed the following overt acts, *inter alia*:

(a) On December 10, 1964, unlawfully issued a writ of attachment in a certain civil action before the Court of Common Pleas for the County of Fairfield held at Stamford, Connecticut, bearing Index Number 5845-1964;

(b) Wrongfully seized and took possession of property of plaintiff on December 17, 1964, and deprived him of the use and possession thereof;

(c) On December 1, 1964, and on February 8, 1965, unlawfully issued writs of attachment in civil actions before the Circuit Court for the County of Fairfield;

(d) Wrongfully seized and took possession of property of plaintiff on December 17, 1964, and on February 9, 1965, and deprived him of the use and possession thereof;

(e) Wrongfully seized and sold plaintiff's property on or about the 1st day of June 1965;

(f) Wrongfully failed and refused to return plaintiff's property upon repeated written and verbal demands of the plaintiff and continues to wrongfully hold property of the plaintiff pursuant to illegal writs of attachment, continuing to the date of this complaint.

EIGHTH: That the conspiracy and the overt acts pursuant thereto were the result of joint action between and among the defendant bank, its officers, directors, agents and employees, and the State of Connecticut or its agents, and other persons.

NINTH: That by reason of said conspiracy and joint action the course of justice in the State of Connecticut has been impeded, hindered, obstructed or defeated, and plaintiff has been deprived of rights, privileges, and immunities secured by the Constitution of the United States and denied the equal protection of the laws, including, but not limited to, the right not to be deprived of property without due process of law.

WHEREFORE, plaintiff demands damages in the sum of five hundred thousand dollars, together with interest and costs, and further demands an order directing the defendant to

cease and desist in withholding plaintiff's property and directing it to perform its banking contract as originally agreed.

Jury Demand

Dated: August 9, 1973,
New York, New York.

Sirs:

PLEASE TAKE NOTICE that, pursuant to the applicable Federal Rules of Civil Procedure, plaintiff hereby demands trial by jury of all issues of fact herein triable by jury.

ROBERT V. RAFTER,
Attorney for Plaintiff,
120 Liberty Street,
New York, New York 10006,
Tel. 962-0248.

A7

Defendant's Motion to Dismiss for Insufficiency

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT V. RAFTER,
Plaintiff,

vs.

THE FAIRFIELD COUNTY TRUST COMPANY,
Defendant.

Civil Action No. B 833.

MOTION TO DISMISS

The defendant, THE FAIRFIELD COUNTY TRUST COMPANY, moves the Court as follows:

1. To dismiss this action under the rule of such cases as *Fischbach and Moore, Inc. v. International Union of Operating Engineers* (DC-CAL), 198 F. Supp. 911 and *Sinclaire v. U. S. Gypsum Co.* (DC-NY), 75 F. Supp. 439 for the reason that it appears on the face of the complaint that the actions complained of took place in 1964 and 1965 being alleged tortious conduct on the part of said defendant at that time, it being the law of this State that no action founded upon a tort shall be brought but within three years from the date of the act or omission complained of (Conn. Gen. Stat. Section 52-577, Revision of 1958.

THE DEFENDANT,
THE FAIRFIELD COUNTY TRUST COMPANY,

By .....,
Its Attorney,
Harry H. Hefferan, Jr.

Defendant's Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT V. RAFTER,

Plaintiff,

vs.

THE FAIRFIELD COUNTY TRUST COMPANY,

Defendant.

Civil Action No. B 833.

NOTICE OF MOTION

To: Robert V. Rafter, Esq.
120 Liberty Street
New York, New York 10006

Please take notice that the undersigned will bring on his Motion To Dismiss on behalf of the defendant, THE FAIRFIELD COUNTY TRUST COMPANY, for hearing before this Court in the United States District Court House, 141 Church Street, New Haven, Connecticut, on the 4th day of September, 1973 at 10:00 a. m. or as soon thereafter as the Court will hear counsel at New Haven, Connecticut.

Dated at Norwalk, Connecticut, this 17th day of August, 1973.

HARRY H. HEFFERAN, JR.,
Attorney for Defendant,
The Fairfield County Trust Company,
637 West Avenue,
Norwalk, Connecticut 06852.

Defendant's Memorandum in Support of Motion to Dismiss

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT V. RAFTER,

Plaintiff,

vs.

THE FAIRFIELD COUNTY TRUST COMPANY,

Defendant.

Civil Action No. B 833.

MEMORANDUM ON MOTION TO DISMISS

FACTS

The plainitff alleges a conspiracy between the defendant and certain others which allegedly denied him the equal protection of the laws under the Federal Constitution.

In Paragraph Seventh of his complaint, he alleged overt acts on December 10, 1964, December 17, 1964, December 1, 1964, February 8, 1965, February 9, 1965, and on or about June 1, 1965. He also complains of certain failure to act at certain unspecified times, but this can hardly be taken to be an overt act or acts required to sustain a complaint of conspiracy.

Defendant's Memorandum in Support of Motion to Dismiss

ARGUMENT

All of the overt acts complained of took place seven or eight years ago. There does not appear to be any federal statute of limitations applicable to this case. State statutes of limitation are applicable in the Federal Courts. *Teplitzky v. Pennsylvania R. Co.* (DC-Ill), 38 F. Supp. 535.

The pertinent Connecticut statute is Section 52-577 of the General Statutes, Revision of 1958, Revised to 1968. This statute in full reads as follows "no action founded upon a tort shall be brought but within three years from the date of the act or omission complained of". Even if the claim is made by plaintiff that his action is for some sort of implied contract between himself and the defendant, the statute of limitations, Section 52-576 states that the action "shall be brought . . . within six years next after the right of action accrues".

The defense of the statute of limitations may be raised by a Motion to Dismiss for insufficiency, if the action appears to be barred on the face of the pleading. *Fischbach & Moore, Inc. v. International Union of Operating Engineers* (DC-Cal), 198 F. Supp. 911. *Cramer v. Aluminum Cooking Utensil Co.* (DC-Pa), 1 Fed R. Dec 232. *Anderson v. Linton* (CA 7), 178 F. (2d) 304; *Albrecht v. Indiana Harbor Belt R. Co.* (CA 7), 178 F (2d) 577; *Wright v. Bankers Service Corp.* (DC-Cal), 39 F. Supp. 980. *Wilson v. Shores-Mueller Co.* (DC-Iowa), 40 F. Supp. 729. *Barnhardt v. Western Maryland Rv. Co.* (DC-Md), 41 F. Supp. 898. Aff'd 128 F (2d) 709. *Sinclair v. U. S. Gypsum Co.* (DC-NY), 75 F. Supp. 439. *Cramer v. Aluminum Cooking Utensil Co.* (DC-Pa), 1 Fed. R. Dec 741. *Pearson v. O'Connor* (DC-DC), 2 Fed. R. Dec 521.

Defendant's Memorandum in Support of Motion to Dismiss

CONCLUSION

The complaint concerns matters which took place almost ten years ago and ought to be dismissed because of the allegations contained therein.

THE DEFENDANT,
THE FAIRFIELD COUNTY TRUST COMPANY,

By .....,
Its Attorney,
Harry H. Hefferan, Jr.

Opinion of the U. S. District Court for the District of Connecticut (Jon O. Newman, U.S.D.J.)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ROBERT V. RAFTER,

v.

THE FAIRFIELD COUNTY TRUST COMPANY.

Civil No. B-833.

RULING ON MOTION TO DISMISS

This is a suit under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, in which the plaintiff alleges that the defendant bank abridged plaintiff's constitutional rights by participating in the attachment of plaintiff's bank account pursuant to Connecticut's former pre-judgment attachment statutes, Conn. Gen. Stat. § 52-279 *et seq.* Plaintiff claims damages and equitable relief to restore his bank account, alleged to contain approximately $200. Defendant has moved to dismiss, alleging that the action is barred by the three-year state statute of limitations for tort actions, Conn. Gen. Stat. § 52-577, since the attachment occurred in 1964 and 1965. Defendant also contends that the core of this controversy was adjudicated adversely to plaintiff in prior litigation. See *Rafter v. Blackmon*, Civil No. 11,458 (D. Conn. Apr. 26, 1967).

Opinion of the U. S. Court for the District of Connecticut (Jon O. Newman, U.S.D.J.)

Wholly apart from statute of limitations and *res judicata* defenses, plaintiff's complaint must be dismissed. After Connecticut's pre-judgment attachment remedy was declared unconstitutional in *Lynch v. Household Finance Corp.*, 360 F.Supp. 720 (D. Conn. 1973), it was adjudicated in this District that a prior good faith use of that remedy would not be compensable in damages. *Pfotzer v. Dorr-Oliver, Inc.*, Civil No. B-587 (D. Conn. May 11, 1973); *Kavanewsky v. Greater Development Co. of Conn., Inc.*, Civil No. B-593 (D. Conn. July 5, 1973).

With respect to plaintiff's claim for equitable relief, defendant represented at the hearing on this motion that plaintiff's bank account would be promptly reinstated.

The claim for damages does not state a claim on which relief can be granted, and the claim for equitable relief is moot. Accordingly, the motion to dismiss the complaint is granted.

Dated at New Haven, Connecticut, this 24 day of October, 1973

JON O. NEWMAN,
United States District Judge.

Judgment of Dismissal of U. S. District Court

Filed
Oct 29 4 20 PM '73
Clerk
U. S. District Court
Bridgeport, Conn.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT V. RAFTER,

v.

THE FAIRFIELD COUNTY TRUST COMPANY.

Civil No. B-833.

JUDGMENT

This cause came on for consideration on a Civil Rights complaint seeking damages and equitable relief and the Court having rendered its Memorandum of Decision dismissing said complaint since the claims for damages does not state a claim on which relief can be granted and the claim for equitable relief is moot.

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendant dismissing the complaint.

Dated at Bridgeport, Connecticut, this 25th day of October, 1973.

SYLVESTER A. MARKOWSKI, *Clerk,*
By VINCENT R. DEROSA,
Vincent R. DeRosa,
Deputy in Charge.

Constitutional and Statutory Provisions

Amendments to the Constitution

ARTICLE THE FIFTH

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE THE SEVENTH

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

Title 28 U. S. C. 1343

TITLE 28 U. S. C.

§ 1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. As amended Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

Title 42 U. S. C. 1983, 1985

TITLE 42 U.S.C.

§ 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R. S. § 1979.

§ 1985. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS—PREVENTING OFFICER FROM PERFORMING DUTIES

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder or impede him in the discharge of his official duties:

Title 42 U. S. C. 1985

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any

citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws:

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators

R. S. § 1980.

Rule 12(b), Federal Rules of Civil Procedure

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74 - 230

ROBERT V. RAFTER,

Petitioner,

—VS.—

THE FAIRFIELD COUNTY TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY H. HEFFERAN, JR.
SIBAL, HEFFERAN & RIMER
637 West Avenue
Norwalk, Connecticut 06852

Attorney for Respondent
The Fairfield County Trust Company

INDEX

PAGE

Table of Authorities ii

Opinion Below 1

Questions Presented 1

Statement of Case 2

ARGUMENT

POINT I —

The Petitioner Cannot Pursue This Matter Because Of Late Filing 3

POINT II —

The Court Correctly Followed The Rule Set Forth in *Tucker v. Maher* And Other Cases In Holding That A Good Faith Use of Existing State Attachment Statutes Does Not Entitle Petitioner To Pursue Due Process Or Equal Protection Monetary Relief 4

POINT III —

The Connecticut Statute Of Limitations Provides An Effective Bar To This Action 5

POINT IV —

The Previous Court Decisions In The Blackmon Case Effectively Dispose Of The Issues Herein (Other Than The Issues Of Late Filing And Statute Of Limitations) 5

CONCLUSION 6

APPENDIX

Transcript Of A Portion Of Deposition Of Robert V. Rafter Taken In Connection With Civil No. 11458, *Rafter v. Blackmon et al*, United States District Court For The District of Connecticut ..... 7 — 9

Connecticut General Statutes § 52-577

Excerpt of a portion of the Decision in *Pfizer v. Dorr-Oliver, Inc.* ..... Fed. Supp. ....., Civ. No. B-587 (D. Conn. May 11, 1973). 9

Excerpt of a portion of the Decision in *Kavenewsky v. Greater Development Co. of Conn., Inc.*, Civil No. B-593 (D. Conn. July 5, 1973). 10

TABLE OF AUTHORITIES

PAGE

Tucker v. Maher, 497 F. 2d 1309 (1974) 2

Kavanewsky v. Greater Development Co. of Conn., Inc. Civil No. B-593 (D. Conn. July 5, 1973) 2

Pfotzer v. Dorr-Oliver, Inc., Civil No. B-587 (D. Conn, May 11, 1973) 2

Parker v. State, 267 U.S. 604, 69 L.Ed. 810, 45 S.C.R. 507 4

Supreme Court of the United States

No. 74 - 230

ROBERT V. RAFTER,

Petitioner,

—VS.—

THE FAIRFIELD COUNTY TRUST COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondent, The Fairfield County Trust Company, hereby opposes the petitioner's prayer for a writ of certiorari filed on September 3, 1974 and request that said petition be denied.

Opinion Below

The decision of the United States Court of Appeals for the Second Circuit in affirming the Rule 12(b) dismissal of complaint in the United States District Court for the District of Connecticut is set forth in the petitioner's appendix (Pet. App. A1 - A2).

Questions Presented

1. Has the petitioner filed his writ of certiorari in the above case within ninety (90) days of the judgment of the United States Court of Appeals for the Second Circuit by filing on September 3, 1974?

2. Was the Court below and the District Court correct in dismissing the complaint following the rules set forth in *Tucker v. Maher* 497 F.2d 1309 (1974), *Pfotzer v. Dorr-Oliver, Inc.* Civil No. B587 (D. Conn. May 11, 1973) and *Kavanewsky v. Greater Development Co. of Conn., Inc.* Civil No. B-593 (D. Conn. July 5, 1973)?

3. Does the Connecticut Statute of Limitations provide an effective bar to this action?

4. Have prior decisions on the same set of facts determined the issue? *Rafter v. Blackmon et al* No. 72-1277 (Supreme Court of the United States October Term, 1972).

Statement of the Case

As presented below to the United States District Court for the District of Connecticut and as further set forth in the opinion of that Court set forth in petitioner's appendix (Pet. App. A12) and as is further set forth in the Brief in Opposition to Petition for Writ of Certiorari of respondents Harvey Koizim and Jerry Davidoff in the matter of *Rafter v. Blackmon et al,* No. 72-1277 (Supreme Court of the United States October Term 1972) this matter commenced in December of 1964 by a lawsuit involving rent and damage in a case brought by one Spiegelman against the petitioner. An attorney in Connecticut issued an attachment writ and then Sheriff Blackmon garnished Two Hundred (200) Dollars at respondent bank. The Deputy Sheriff also attached petitioner's automobile which carried a lien of this respondent and in which petitioner had no equity.

Subsequently that action was withdrawn and an identical action absent a deficiency in the summons was instituted through the same attorney and Deputy Sheriff. This petitioner instituted suit in 1966 against that Deputy Sheriff pursuant to the same

United States statutes as herein for damages claiming an alleged violation of his civil rights. Subsequently, other attorneys attached the same bank account using different sheriffs. Ultimately, the automobile was repossessed by this respondent.

The action in the United States District Court against Deputy Sheriff Blackmon and the lawyers was subject to a successful Motion for Summary Judgment by the defendant Deputy Sheriff and the defendant attorneys and the matter was appealed to the United States Court of Appeals for the Second Circuit where the judgment of the District Court was affirmed after which petitioner herein petitioned for a writ of certiorari. *Rafter v. Blackmon et al* No. 72-1277 (Supreme Court of the United States, October Term, 1972). Thereafter, in 1973 the present action was commenced making almost identical claims against respondent bank apparently claiming that the acceptance of apparently valid legal process under existing state law served upon respondent by certain sheriffs at the behest of certain attorneys was a conspiracy which denied petitioner equal protection of the laws. The complaint, respondent's Motion to Dismiss, the opinion of the District Court and judgment of dismissal and the judgment of the United States Court of Appeals for the Second Circuit are contained in the Appendix of petitioner. The judgment of the Court of Appeals is dated June 3, 1974 and the instant petition was filed with the Clerk of the Court ninety-two (92) days later, on September 3, 1974.

POINT I

The petitioner cannot pursue this matter because of late filing.

The petitioner had ninety (90) days to file, twenty-seven (27) days in June, thirty-one (31) days in July, thirty-one (31) days in August and the first (1st) day of September. Therefore, the petition should be dismissed for failure to submit within the

time prescribed. *Parker v. State*, 267 U.S. 604, 69 L.Ed. 810, 45 S.C.R. 507. 28 U.S.C. § 2101 (c).

POINT II

The court correctly followed the rule set forth in Tucker v. Maher and other cases in holding that a good faith use of existing state attachment statutes does not entitle petitioner to pursue due process or equal protection monetary relief.

The petitioner's main point seems to be that his case differs from *Tucker v. Maher*, 497 F.2d 1309 (1974), *Pfotzer v. Dorr-Oliver, Inc.*, Civil No. B587 (D. Conn. May 11, 1973) and *Kavanewsky v. Greater Development Co. of Conn., Inc.* Civil No. B-593 (D. Conn. July 5, 1973) in that he alleges a conspiracy. Only in the broadest sense does he make the allegations. On deposition in the prior matter on the same set of facts which this petitioner attempted to bring to this Court, he admitted that he knew of no facts that made the respondent bank a part of the conspiracy; he merely alleged then a conspiracy; that Deputy Sheriff Blackmon and the attorneys conspired against him with "others". Now he alleges that the respondent bank conspired with "others" pursuant to a conspiracy. As is set forth in the appendix to this Brief, he was specifically asked if he was claiming that the bank was a part of the conspiracy. He said no. (Resp. App. 7). He simply stated that he put it in his complaint. Indeed, he claimed that he had in mind no corporation, Connecticut, New York or anywhere as a party to the conspiracy, he just put it in his complaint (Resp. App. 8).

Thus, there is no fact nor real allegation of a conspiracy and the case does not substantially differ from the line of cases relied upon by the District Court and expanded by the Court of Appeals with the *Tucker* decision.

Indeed, the petitioner suffered no measurable damages in that respondent cleared the attachments from the account (Pet. App. A13) and the car which was repossessed was one in which petitioner had no equity. (Resp. App. 8)

POINT III

The Connecticut Statute of Limitations provides an effective bar to this action.

Although the District Court did not reach the issue of the statute of limitations, the issue was a part of the Motion to Dismiss and would be a bar to this action if litigated. All the occurrences objected to by the petitioner occurred in 1964 and 1965 and the action commenced August 9, 1973. The Connecticut Tort Statute of Limitations is attached. (Resp. App. 9). Accordingly, there is no justiciable controversy in any case.

POINT IV

The previous court decisions in the Blackmon case effectively dispose of the issues herein (other than the issues of late filing and statute of limitations).

Petitioner had his day in Court in the previous action on the same set of facts brought to the same courts. Indeed, he issued a Covenant Not To Sue most of the possible defendants (Brief in Opposition of Respondents Harvey Koizim and Jerry Davidoff, *Rafter v. Blackmon et al.* No. 72-1277, Supreme Court of the United States, October Term, 1972 App. P. 9.) It appears to respondent that it was selected for this litigation because it unfortunately was not included in the Covenant Not To Sue. The issues are stale, moot and have been decided.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Norwalk, Connecticut 06852

Attorney for Respondent
The Fairfield County Trust Company

APPENDIX

A. I don't know. I have no one specifically in mind at this time.

Q. Are you claiming that the bank was a part of the conspiracy?

A. Not at this time, no.

Q. You are claiming a conspiracy, is that right?

A. That's right in the complaint, yes.

Q. Are you claiming that any corporation in Connecticut is a part of the conspiracy?

A. Mr. Gordon, can't we cut this short? I've named just two defendants and that's all I know about right now.

Q. Well, you've apparently — you apparently know about a little bit more or are making claim of a little bit more than just two defendants. You made an allegation about a little, you've made an allegation, you've already specifically told us, Mr. Rafter, about the person who came with the sheriff.

A. Uh huh.

Q. Are you claiming that the garage where the car was kept, that person's a part of the conspiracy?

A. Not that I know of.

Q. Are you claiming that any corporation in Connecticut was a party to the conspiracy?

A. No, there was no mention of corporation, in the complaint.

Q. I'm not asking what's in the complaint. I can read

that. I'm asking what you are claiming.

A. My claim is set forth in the complaint, Mr. Gordon. There's no mention of a corporation.

Q. Do you have in mind that any Connecticut corporation was a party to the conspiracy?

A. No.

Q. Do you have in mind that any New York corporation was a part of the conspiracy?

A. No.

Q. Do you have in mind that any corporation anywhere was a party to the conspiracy?

A. No.

* * *

Q. So that the only proof you gave to Judge Johnson of the value of what was attached was your statement that approximately $200 worth of bank account was attached?

A. Oh, no. I told him about the car having been purchased brand new two months ago and financed through the Fairfield County Trust Company. He knew it was a valuable car and he had the return of the Sheriff there.

Q. But you owed money on the car, didn't you?

A. Oh, yes.

Q. You owed quite a bit of money on the car?

A. Yes, indeed.

Q. Did you give any proof of the value of your equity of the car.

A. I think I told Judge Johnson I had no equity in the car.

Q. In other words, it was your position at that hearing that you had no equity in the car and that there was only $200 under attachment, is that right, in the bank account, approximately $200?

A. That and also my position that the attachment was supposed to be property of the defendant and if I had no equity in the car what were they doing taking the car.

CONNECTICUT GENERAL STATUTES — Sec. 52-577

Sec. 52-577. ACTION FOUNDED UPON A TORT. No action founded upon a tort shall be brought but within three years from the date of the act or ommission complained of. (1949 Rev., S. 8316)

Excerpt of a portion of the Decision in *Pfotzer v. Dorr-Oliver, Inc.* ..... Fed. Supp. ....., Civ. No. B-587 (D. Conn. May 11, 1973).

In addition to their claim for injunctive relief, plaintiffs seek damages, but this claim also warrants dismissal. Even if plaintiffs prevailed on the merits of their attack on both garnishments, damages would not be awarded. The defendants obtained the first garnishment under a statute valid at the time they acted, and any infirmity in the second garnishment stems from the alleged inadequacy of the hearing in the state court. Even if the hearing was deficient, defendants would in no event have to respond in damages for acting in good faith upon a court order they believed they had validly obtained.

Accordingly, the defendants' motion to dismiss is granted.

Excerpt of a portion of the Decision in *Kavenewsky v. Greater Development Co. of Conn., Inc.*, Civil No. B-593 (D. Conn. July 5, 1973).

Plaintiffs also seek damages for the expenses incurred in replacing the attachment with a bond. In the absence of any showing that defendants acted in bad faith in securing the attachment, they will not be required to respond in damages for proceeding under statutes that had not then been ruled invalid. *Pfotzer v. Dorr-Oliver, Inc.*, Civ. No. B-587 (D. Conn. May 11, 1973).

Accordingly, judgment will enter dismissing the complaint.